

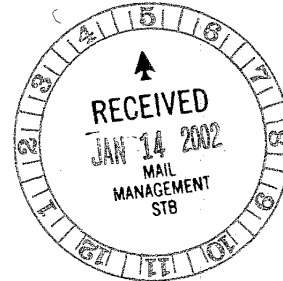
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January 14, 2002

By Messenger

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

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RE: Finance Docket No. 32760, *Union Pacific Corporation et al — Control and Merger — Southern Pacific Rail Corp. et al*

Dear Mr. Williams:

This letter is submitted on behalf of The National Industrial Transportation League in support of the relief sought by Burlington Northern and Santa Fe Ry. Company in its Petition for Clarification filed on December 21, 2001, in this proceeding ("BNSF-98").¹ In the principal decision in this proceeding, the Board imposed as a condition the terms of the BNSF agreement. That agreement provided for BNSF to obtain the right to conduct extensive trackage rights operations over the lines of the merged UP and SP. The purpose of those rights was to preserve the competitive options available to shippers prior to the merger. *UP/SP*, 1 S.T.B. at 252-254.

The level of the trackage rights fees charged by UP to BNSF for its operations was also a matter that received intensive consideration during the proceeding. *UP/SP*, 1 S.T.B. at 413-417. Indeed, the applicants (and BNSF), in response to the CMA agreement, agreed to modify the procedure for periodic adjustment of the level of the trackage rights charges contained in the BNSF agreement. *UP/SP*, 1 S.T.B. at 416, n. 169 and BNSF-98 at 5. In essence, the adjustment mechanism agreed to between UP and BNSF involved the comparison of certain elements of the actual costs for the merged system generated by the Uniform Rail Costing System ("URCS"). See Section 12 of the BNSF agreement.

The issue raised by BNSF in the petition for clarification involves whether the periodic adjustment to the level of the trackage rights may include any amount reflecting either: (1) the so-called "acquisition premium" paid by UP for the assets of SP, or (2) any amount reflecting the capital costs incurred for certain merger-related investments. BNSF-98 at 6. The League concurs with and supports BNSF's contention that neither of these elements should be included in the mechanism for adjusting the trackage rights fees under the BNSF agreement.

The Board's extensive discussion of the level of the trackage rights fees in principal decision indicates that it was very aware of the need to ensure that the charges were not so high that BNSF could not effectively replace the competition lost when UP absorbed SP. *UP/SP*, 1 S.T.B. at 413. It is plainly obvious that SP, prior to the merger would not have to bear capital costs for merger-related

¹ Abbreviations used in this reply are the same as those used in Decision No. 44 in Docket No. 32760, *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.* 1 S.T.B. 233, 557 (1996) ("*UP/SP*"), *aff'd*, *Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

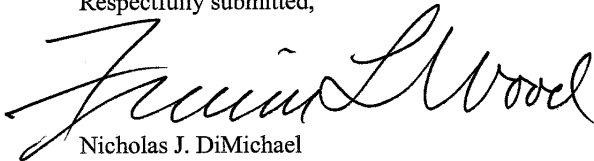
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improvements. It is also obvious that but for the merger, there would be no impact on the incumbent carrier's costs from any merger-related acquisition premium. The technical details of how, under the STB's accounting and cost-finding procedures, those costs might have an impact on the elements of URCS unit costs that are relevant to the adjustment mechanism in the BNSF agreement are certainly complicated. Nonetheless, they should not obscure the fundamental policy imperative articulated in the Board's principal decision. As the Board stated, "the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." *UP/SP*, 1 S.T.B. at 419. *See also UP/SP*, 1 S.T.B. at 368.

It is essential that the terms of the BNSF agreement, and the adjustment mechanism for the trackage rights fees that are a vital component of the competitive structure, not be interpreted and applied in such a manner that, over time, BNSF is exposed to cost increases that impair its ability to replicate the lost competition from SP. For this reason, the League urges the Board to grant the relief requested in BNSF-97.

Respectfully submitted,



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